No. 10,333

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JAMES P. HART, Trustee of International Mining & Milling Company (a corporation), Debtor and Mount Gaines Mining Company (a corporation), Debtor,

Appellant,

vs.

CALIFORNIA PACIFIC TITLE AND TRUST COMPANY (a corporation), TITLE INSURANCE AND GUARANTY COMPANY (a corporation), HUMPHREY ESTATES, INC. (a corporation), HARRY LEE JONES, ARTHUR J. EDWARDS, D. R. GUSTAVESON, JAMES S. HAZEN, PERSIS E. HAZEN, BYRON HALVERSON and JOSEPH J. MUELLER,

Appellees.

APPELLANT'S REPLY BRIEF.

JAMES T. BOYD,
E. C. Lyon Building, Reno, Nevada,
Attorney for Appellant.

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Appellees.

APPELLANT'S REPLY BRIEF.

The brief of the respondents, California Pacific Title & Trust Company and Title Insurance and Guaranty Company, is devoted, at least most of it, to the jurisdiction of the lower Court to hear and determine the matters, and brought this question into the

hearing before the Appellate Court without any regard to what the lower Court really determined.

The California Pacific Title & Trust Company takes the position that the petitioner is only seeking a money judgment against the California Pacific Title & Trust Company for monies alleged to have been paid it. That it had dispersed the money and conveyed the legal title to the property to the Title Insurance & Guaranty Company. That since the conveyance it ceased to have any interest in the matter, and that by its actions it had discharged itself from any liability.

The petition specifically sets forth that demand was made upon the California Pacific Title & Trust Company to apply the rentals and royalties paid in prior to May 25, 1937, that three-fourths of the amount being the sum of $13,063.86 (Tr. page 7), and it was the California Pacific Title & Trust Company that refused to do so. (Tr. page 26.) Further, the California Pacific Title & Trust Company claims that on September 6, 1940, the California Pacific Title & Trust Company conveyed to the Title Insurance & Guaranty Company all of the mining claims in question in this proceeding. We have from the record that it was the California Pacific Title & Trust Company that refused to apply the royalties, while it affirmatively appears that the full $50,000.00 mentioned in the option had been paid on August 28, 1939. The California Pacific Title & Trust Company held the title and held it until a year after that date. (Affidavit of Harry Geballe, Tr. page 41.) It also appears that

when this proceeding was commenced, March 2, 1942, the Title Insurance & Guaranty Company was the holder of the legal title. (Affidavit of A. V. Salerno, Tr. page 33.)

Both of these corporations are called in to account for their actions. It is the act of the California Pacific Title & Trust Company in refusing to apply the monies upon the purchase price that was the cause of the injury and the Title Insurance & Guaranty Company is now the present holder of the legal title to the mining claims and it is this corporation, or perhaps both corporations, that would be compelled to execute a conveyance if the Mount Gaines Mining Company should prevail in this proceeding. Both of these corporations are not only proper but necessary parties in this proceeding.

It also appears from the petition that from the 1st day of December, 1934, the Mount Gaines Mining Company entered into the possession of the mining claims and ever since that time has been and now is in the full and exclusive possession of said mining claims. (Tr. pages 5 and 6.)

It is perfectly clear from the petition that this proceeding is a controversy over property in the possession and claimed to be owned by the Mount Gaines Mining Company, and was in the possession of the mining company since December 1, 1934. Both of the Trust Companies are necessary parties for the determination of the right of the Mount Gaines Mining Company to the possession and ownership of the property.

JURISDICTION.

The jurisdiction of the Bankruptcy Court in reorganization proceedings, where title to property in the possession of the bankrupt is questioned, is exclusive and it has been repeatedly held that the Court has power by virtue of the possession of the property at the time of filing of the petition to determine all questions concerning such property.

> "But the exclusive jurisdiction acquired by the bankruptcy court through taking possession of the interurban railway under claim of title, was not limited to the prevention of interference with the use of the land. Compare Chicago Bd. of Trade v. Johnson, 264 U. S. 1, 11, 68 L. ed. 533, 536, 44 S. Ct. 232, 2 Am. Bankr. Rep. (N.S.) 528; Taubel-Scott-Kitzmiller Co. v. Fox, 264 U. S. 426, 433, 68 L. ed. 770, 774, 44 S. Ct. 396. The jurisdiction extends also to the adjudication of questions respecting the title. Whit v. Schloerb, 178 U. S. 542, 44 L. ed. 1183, 20 S. Ct. 1007, 4 Am. Bankr. Rep. 178; Re Eppstein (C.C.A. 8th), 156 Fed. 42, 17 L. R. A. (N.S.) 465, 19 Am. Bankr. Rep. 89. Compare Wabash R. Co. v. Adelbert College, 208 U. S. 38, 54, 52 L. ed. 379, 386, 28 S. Ct. 182; Security Mortg. Co. v. Powers, 278 U. S. 149, 153, 73 L. ed. 236, 239, 49 S. Ct. 84, 13 Am. Bankr. Rep. (N.S.) 86."
>
> *Ex parte Baldwin,* 291 U. S., p. 616, 78 L. ed., p. 1023;
>
> *Thompson v. Magnolia Petroleum Co.,* 309 U. S., pp. 482, 483, 84 L. ed. 880.

"A court of bankruptcy has jurisdiction to 'bring in and substitute additional persons or parties in proceedings in bankruptcy when necessary for

the complete determination of a matter in controversy; (and to) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto', with exceptions not here material. This jurisdiction of the bankruptcy court extends to the determination of controversies relating to all property in the debtor's physical possession or in the hands of the debtor's agent at the time of the filing of a petition in bankruptcy. In every case the bankruptcy court has power, in the first instance, to determine whether it has that actual or constructive possession which is essential to its jurisdiction to proceed."

Harris v. Avery Brundage Co., 83 L. ed. 103, 305 U. S. 161-163;

Mt. Forest Fur Farms of America, 122 F. (2d) 232.

RECOVERY OF THE OVERPAYMENTS.

The claim for the overpayment of the money to the two Trustees is based upon the claim that on August 28, 1939, the full amount of the purchase price of $50,000.00 for three-fourths interest in the mining claims had been paid. The right to the recovery of that money would naturally fail if the action for the title should fail so that the claim for money is incidental and based upon the claim of the Trustee that the full purchase price of the three-fourths interest had been paid August 28, 1939, and that the Mount Gaines Mining Company was the owner of the three-fourths interest in the claims.

The contention that the Trustee does not claim anything but money from the California Pacific Title & Trust Company is not supported by the petition. It asks that the Trustees execute and deliver a deed to the three-fourths interest. California Pacific Title and Trust Company signed Exhibit "C" refusing to apply three-fourths of the royalty payments upon the purchase price and the California Pacific Title & Trust Company held the property thereafter regardless of the claim to the title by the Mount Gaines Mining Company. (Ex. C, Tr. page 26.)

Further, the same Exhibit "C" affirmatively shows that in refusing to apply the money it was not instructed by all of the beneficiaries to take the action it did take. It states:

> "Under the provisions of such judgment, the action of the undersigned as such Trustee is to be determined by the united instructions of all the Beneficiaries named therein. The undersigned has not, up to date, received the instructions from all of said Beneficiaries, but in the absence thereof and in order that the failure of the undersigned to reply to your purported election to exercise the option which you claim to have, may not be construed as in any way affecting any of the Beneficiaries of this Trust, or their rights therein, you are advised that the undersigned cannot accept your purported election to exercise your claimed option."
>
> (Exhibit C, Tr. page 27.)

The right to this money arose by virtue of the contract to purchase the property on the part of the

Mount Gaines Mining Company and to sell the property by the owners. The payments were part of this contract and it is this contract that is now before the Court for its consideration. If this Court determines that the notice to C. F. Humphrey, Holcomb, Harry Lee Jones, and the California Pacific Title and Trust Company, dated May 25, 1937, exercised the option (Tr. page 25), then the option went out of existence and an executory contract for the sale and purchase of the mining claims came into existence and it is that contract under which it is claimed that the overpayments were made.

It is that contract under which the petitioner claims to have become the owner of three-fourths interest in the mining claims and under which it inadvertently or wrongfully made the overpayments that is to be considered. This money was the property of the Mount Gaines Mining Company when it was paid and if it was paid inadvertently or wrongfully the respondents herein never became the rightful owners of it, and this proceeding affects all of the respondents for the right that is claimed against all of them and arose out of the contract.

> "There is a saying that courts of equity delight to do complete justice and not by halves. This maxim has grown out of the desire of the court completely to decide every matter involved in the litigation, so that there may be no roots of controversy left out of which other suits may spring."
>
> *Streets Federal Equity Practice,* Vol. 1, Section 396, p. 238.

> "Not only this, the court of equity does not encourage, and sometimes will not even tolerate, the bringing of a suit to settle only a part of a controversy, where the whole may be conveniently determined in one suit. It will not allow a single cause of action to be split up into two or more branches. Thus a bill will not lie for a part of an account. The suit should cover all the matters of account."
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> *Streets Federal Equity Practice,* Vol. 1, Section 397, p. 239.

The cases cited by the two corporations, California Pacific Title and Trust Company and the Title Insurance & Guaranty Company are not in point and their statement of the case is to some extent misleading.

The *United States v. Tacoma Oriental S. S. Co.,* 86 Fed. (2d), page 363, was an attempted summary proceeding to collect a debt from the United States for carrying mails to China. Congress had appropriated money but the officers of the Treasury had not paid, or refused to pay them and in speaking of it the Court makes this statement:

> "When the appropriation was here made, the funds thus appropriated were not by the appropriation transferred to appellee. The funds would become the property of appellee only by application of such appropriation, or, in other words, payment to appellee. The funds appropriated, were not, therefore, property belonging to appellee. We conclude that the lower court had no jurisdiction over the persons of the individual appellants."

That case decided that it was only a debt and it had never been paid and the money had never been in the possession of the steamship company.

In the case of *Avondale Farms Dairy, Inc.,* 25 Fed. Supp., page 605, the dairy company had sold their good will to Stein and left certain property in his possession for the consideration that Stein would sell the dairy's products in his store and make all of his purchases from the dairy company. After conducting the business for awhile, Stein refused to comply with the contract and notified the dairy company to take their fixtures away or else he would store them at the expense of the dairy company. The dairy company had filed a petition for reorganization in the District Court of the Eastern District of Pennsylvania and it immediately applied to that Court to compel Stein to perform his part of that contract. The Court, in speaking of it, states:

> "2. It follows that this Court could make any order to protect the tangible property of the debtor in the possession of Stein. The real controversy however is not over the tangible property but over what counsel for the debtor describes as an intangible asset of the debtor, consisting of its good will in the business. In other words, it asserts that when it was itself conducting the business it owned in addition to the tangible assets of the store its good will. This undoubtedly is in one sense property.
>
> "3. The claim of right which the debtor is asserting against Stein arises wholly out of his contract and what it seeks from the Court is an order upon Stein requiring him to purchase the supplies for

> his store from the debtor and from no one else. This, as we have said, is the equivalent of a bill for specific performance of a contract. Stein is undoubtedly under whatever legal obligations he has incurred because of his contract and whatever the rights of the debtor are under this contract may be enforced at law or in equity."

The case of *Bovay, et al. v. H. M. Byllesby & Co., et al.,* 88 Fed. (2d) 990, is explained in the first paragraph of the opinion:

> "This is not a suit to recover property admittedly owned by the bridge company, nor one for a stay or injunction of any kind. It is a suit upon a chose in action, or choses in action, and seeks a judicial determination of the validity of an alleged indebtedness of appellees for moneys due appellants as trustees of the debtor. It is conceded that a chose in action which belongs to the debtor is an intangible asset, subject to the control of the bankruptcy court, but the title to the thing is not sufficient to confer jurisdiction over the person of the defendants owing the money who reside in another district and are beyond the ordinary processes of the court."

This is identical with the cause of action attempted to be set out in *United States v. Tacoma Oriental S. S. Co.* in 86 Fed. and received the same kind of treatment.

The respondents in this case all assume, or make the mistake of assuming, that this is an action on the option. They seem to disregard the claims made by the appellant in his opening brief that the option was

exercised and by the exercising of that option the mining company had an agreement with the owner to purchase the property and did purchase it for $50,000.00, and assumed a liability to pay $50,000.00. What had been an option with an option price of $50,000.00, until the notice was served on the trustees and the owners, then became an agreement of sale and purchase and the Mount Gaines Mining Company became the debtor to the owners for the sum of $50,000.00 which could be enforced against it and against any property that the mining company might own including the three-fourths interest in the mines in question.

The writer of this brief does not want to reiterate matters set out in his opening brief but cannot help reiterating here, or at least traversing, some of the matters set out in the brief of the two corporations, appellees herein. There is no question but what an option is strictly construed but it could be fairly construed so as to give effect to the intention of the parties. There was a valuable consideration given for that option as appears by a most casual reading of the terms of the so-called lease. When it is remembered that the mill constructed by appellant, head frames, compressors, fixtures, machinery of all kinds used in the operation of this mine, when put upon the mine became the property of the owners of the mine and for that agreement upon the part of the Mount Gaines Mining Company, the owners expressly promised:

> "It is further agreed that seventy-five per cent (75%) of the royalties and rental payments paid

> under this *lease* shall be applied and credited upon the purchase price of the said three-fourth (¾) interest in said property herein provided to be sold in event the second parties exercise said option and purchase said property hereunder,"

That statement expressly states:

> "the royalties and rentals paid under *this lease* shall be applied and credited,"

The lease on that three-fourths interest ceased and went out of existence when the Mount Gaines Mining Company assumed the liability to pay $50,000.00 for the three-fourths interest and when it assumed that liability it became the owner of three-fourths of the beneficial interest of that property and the earnings thereafter. Three-fourths of it belonged to the Mount Gaines Mining Company and one-fourth belonged to the owners.

It affirmatively appears from the petition that on the 25th day of May, 1937, when the notice of the exercise of the option was served, $17,418.48 had been paid to J. W. Humphrey and the California Pacific Title & Trust Company and three-fourths of that amount, the sum of $13,063.86, was directed to be applied upon the purchase price. The owners refused to comply with that and demanded $10,000.00 in cash. The lower Court in its opinion held that it was only the royalties paid after the notice of the exercise of the lease that could be applied upon the purchase price.

It is to be inferred from the option that 10% of the gross receipts of the sale of ores was to be paid to the

owners. 25% of that 10% could only be considered royalty payments; the other 75% was the money of the Mount Gaines Mining Company and was a payment upon the purchase price of the property. That 75% was not paid under the lease but was paid under the agreement to purchase and was to be applied upon the debt of $50,000.00 owed by the Mount Gaines Mining Company to the owners.

Under the option, the optionee was not to do anything but the option contained a promise that if the Mount Gaines Mining Company would purchase the property it would apply 75% of the money paid under the lease upon the purchase price. There was no promise upon the part of the Mount Gaines Mining Company that it would or would not purchase the property. The promise to apply the rentals and royalties paid was made by the owners to the optionee and when the Mount Gaines Mining Company, by its notice of May 25, 1937, exercised the option, the trustee and the owners were in duty bound to apply three-fourths of all of the royalties or rentals theretofore paid under the lease upon the purchase price. The owners attempted to repudiate their agreement and promise and attempted to withhold $13,063.86, for their own benefit and compel the Mount Gaines Mining Company to pay $10,000.00 for the privilege of exercising that option.

If there is any ambiguity in that option it was the fault of the owner.

> "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in

the sense in which the promisor believed, at the time of making it, that the promisee understood it."

Civil Code of California, Section 1649.

"In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party."

Civil Code of California, Section 1654.

"When the terms of an agreement have been intended in a different sense by the different parties to it, that sense is to prevail against either party in which he supposed the other understood it, and when different constructions of a provision are otherwise equally proper, that is to be taken which is most favorable to the party in whose favor the provision was made."

Code of Civil Procedure, Section 1864.

TIME IS OF THE ESSENCE.

The respondents attempt to make some point of the fact that the payments required for the purchase price should have been completed on May 25, 1939 but were not completed until August 28, 1939, and assert that time is the essence of the contract.

Their position in that matter is rather inconsistent. First, they say that the option was not exercised for

the reason that $10,000.00 had not been paid at the time of the notice to exercise the option and unless $10,000.00 was paid they would not apply 75% of the payments made to them under the lease. If the position of the appellant herein is correct and if the lease was exercised by the written notice, the action of the owners in refusing to apply that payment was inequitable and unjust and prevented the appellant herein from making up whatever difference existed between the application of the monies paid on May 25, 1937 to May 25, 1939. When they refused to recognize the notice of May 25, 1937, exercising the option, they deprived the appellant herein the use of that property in aiding and assisting in getting sufficient funds to make the payments and compelled them to rely solely upon the returns from the mine. This was the fault of the appellees or owners of that property and they now attempt to use that piece of injustice as a means for claiming we have not complied with our contract to pay the money in the stipulated time.

Under the contention of the appellant herein when the Mount Gaines Mining Company notified the owners that it exercised the option it became indebted to the owners in the sum of $50,000.00 and that indebtedness was evidenced by the option and by the notice of the exercise of the option. The equitable title passed out of the owners and to the Mount Gaines Mining Company in exchange for the debt and the owners were merely the trustees of the legal title and the Mount Gaines Mining Company the trustee of the purchase price. That debt was a continuing debt until it was paid and there is no agreement, or contract, or cove-

nant in the option or even in the lease that makes the failure to make any payments on time a termination of the contract and a forfeiture of the monies paid on the purchase price or if such forfeiture is asserted there is no agreement that the contract shall become null and void. The debt would still remain a debt of the Mount Gaines Mining Company.

Hansen v. Havener, 231 Pac., page 363;
Pomeroy on Contracts, Section 315;
Boone v. Templeman, 158 Cal., page 290;
E. Bennett v. J. D. Hyde, 92 Cal., page 131;
Steele v. Branch, 40 Cal., page 3.

> "Whenever, also, the plaintiff's delay or default in performing the terms and conditions on his part, at the time specified, is caused by the defendant's own neglect, laches, or other conduct, such omission will not be a ground for refusing the relief which he asks, no matter how express may be the provision of the contract requiring a punctual performance and making it essential; a defendant cannot rely as a defense upon a breach which he himself has caused."

Pomeroy on Contracts, Section 337.

It clearly appears from the lease, the option, and the conduct of the parties that this appellant has faithfully complied with its contract. It has paid the owners a large sum of money for three-fourths of that property and the owners have been the gainer both in money and property and still own one-fourth interest of this mining property in addition to the large sales price paid them. The conduct of the owners was such that it ought not to receive the approval of equity.

Their promise to apply the royalties and rentals paid them in the period of time prior to May 25, 1937, was disregarded by them and they continued to refuse until the trustee of the Mount Gaines Mining Company in reorganization was compelled to appeal to the Court to enforce their promise. As a justification for their conduct some of the briefs assert that the appellant stood idly by and did nothing when it was notified that they would not apply the royalties upon the purchase price, when there was nothing the Mount Gaines Mining Company could have done except to do what it did and now when it appeals to the Court they try to defend their conduct and still persist in claiming the property by alleging, time is the essence of the contract.

Dated, Reno, Nevada,
March 29, 1943.

Respectfully submitted,
JAMES T. BOYD,
Attorney for Appellant.